IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL COPY

October Term, 1978

No. 78-5414

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SUPREME COURT, U.S.

ILYA WOLSTON,

Petitioner,

v.

THE READER'S DIGEST ASSOCIATION, INC., d/b/a READER'S DIGEST PRESS; BANTAM BOOKS, INC.; BOOK-OF-THE-MONTH CLUB, INC.; MACMILLAN BOOK CLUBS, INC.; JOHN BARRON,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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I.

Respondents' brief in opposition further focuses the "public figure" issue in this case. Respondents argue that by failing to appear in response to a grand jury subpoena "petitioner voluntarily thrust himself into the public controversy relating to the government's grand jury investigation" (Brief in Opp., p. 7), and thereby became a "public figure" within the meaning of Gertz and Firestone.[1/] But

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1/ Gertz v. Robert Welch, Inc., 418 U.S. 323; Time, Inc. v. Firestone, 424 U.S. 448.

that argument fails to give recognition to the fact that the process started with governmental coercion through compulsory process, akin to Mrs. Firestone's compulsion to resort to the courts if she would obtain a divorce, and further depends on the proposition that failure to appear in response to a subpoena is, as a matter of law and without regard to the circumstances, voluntary action by which a person purposefully injects himself into a public controversy. While it is possible to conceive of circumstances which would support a determination of voluntariness, such as where an individual desired to make himself the object of an attack on state power, there are other circumstances which are inconsistent with such conclusion. We submit that the circumstances here present a compelling instance of nonvoluntariness. Indeed, this much is tacitly acknowledged by respondents' felt need to characterize petitioner's evidence on this point as "self-serving" (Brief in Opp. p. 12, n.2). In any event, the evidence submitted in opposition to defendants' motion for summary judgment should have precluded the granting of that motion.

II.

The second question raised by the Petition is whether, assuming that this action is governed by the New York Times "malice" standard, it is appropriate to grant summary judgment on that issue by crediting the affidavit or deposition of the author of the publication with respect to his states of mind and drawing inferences favorable to the defendants from the evidence. We asserted that the Court of Appeals' decision affirming summary judgment on that issue is contrary to the decisions of this Court and is in conflict with a decision of

the Ninth Circuit. Respondents address only the inter-circuit conflict. That able and resourceful counsel have been unable to advance even a plausible argument to reconcile the decision below with the precedents of this Court in Poller, [2/] Diebold, [3/] and Agosto, [4/] cited at Pet. 15-16, is reason enough, we submit, why the decision below cannot stand. Indeed, respondents' statement of the case reinforces our showing of the petition that it was essential to the decision below that Barron's testimony be credited. (See the references thereto at Brief in Opp., p. 7.) The reference, id., to what "the record also showed" is likewise a reference to Barron's testimony. And respondents' reliance on the Court of Appeals' discussion of the evidence (Brief in Opp., p. 14) does not explain how, given the well-established limitations on summary judgment, it could have been proper for the Court of Appeals to accept as true Barron's affidavit and deposition regarding his own state of mind, and to draw inferences from the record which are favorable to the party moving for summary judgment. Contrast the cases cited at Pet. 15-16.

Given the conflict between the decision below and those of this Court, the presence of a conflict between the circuits should be unnecessary to merit review. In any event, the presence of a conflict between the decision below in this

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2/ Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464.

3/ United States v. Diebold, Inc., 369 U.S. 654.

4/ Agosto v. Immigration & Naturalization Service, 98 S.Ct. 2081.

case and that of the Ninth Circuit in Ysrael, [5] is uncontroverted and uncontrovertible. It is plain that the court below in this case did precisely that against which the Ninth Circuit admonished in Ysrael, for the court below did "weigh the credibility of the evidence" and did "draw inferences in favor of the moving party" which is what the Ninth Circuit correctly held "neither the judge nor this Court on appeal has the authority" to do. 492 F.2d at 441 quoted at Pet. 18. [6]

Respondents profess to be unable "to comprehend" our analogy of the present case to Herbert v. Lando, #77-1105, argued October 31, 1978. (Brief in Opp. 14, n.3). The similarity is this: In both cases the defendants have asserted,

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5/ Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael, 492 F.2d 438 (9 Cir.), cert. denied, 419 U.S. 872 (1974).

6/ Respondents attempt to confine our position to be only that there is a conflict between the Ninth Circuit's decision in Ysrael and that of the D.C. Circuit in Wasserman v. Time, Inc., 424 F.2d 920 (1970), cert. denied, 398 U.S. 940 (1970). (Brief in Opp., p. 13, particularly the sentence beginning, "In essence * * *", which sweeps away everything else.) Wasserman was quoted in the Petition because it was the most elaborate statement of the special summary judgment rule which the District of Columbia Circuit has declared for cases which it considers to be governed by the New York Times standard; it reaffirmed the rule Judge Wright had expressed for this Court in Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967), the precedent cited by the Court of Appeals in this case.

While Judge Wright's opinion in Wasserman was a concurring opinion, what is relevant is that it represented the views of the majority of the panel, since Judge Robinson joined therein. And even if that opinion was not necessary to the decision, it was an instruction to the lower courts in that Circuit. The District Courts have so understood Keogh and Wasserman as placing on plaintiff a special burden to defeat a motion for judgment on the New York Times malice issue. See, in addition to the District Court Opinion herein (Pet. A-29), Buckley v. Littell, 539 F.2d 882 (2 Cir. 1976); Martin Marietta Corp. v. Evening Star Newspaper, 417 F. Supp. 947, 954 (D.D.C., Flannery, J.); Hoffman v. Washington Post Co., 433 F. Supp. 600, 604-605 (D.D.C., Pratt, J.).

and the Courts of Appeals have sustained, procedural rules which enlarge the burden of a plaintiff in satisfying the requirement of establishing malice within New York Times. The effect in both cases, is to alter the balance between the interests of the victim of an allegedly defamatory publication and the publisher thereof, see Pet. 17-18, thereby approaching the result conveyed in the concurring opinions in New York Times rather than that of the majority. The difference between the cases is that in Herbert the permissible scope of discovery may be an open question, whereas in the present case the summary judgment rule applied by the Court below is squarely contrary to the prospects established and reaffirmed in the precedents of this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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